

U.S. Department of Labor

Office of Administrative Law Judges
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Date: October 20, 2000

Case No.: 2000-LHC-1322

OWCP No.: 06-168710

In the Matter of:

WILLIE E. MCCORNELL

Claimant

v.

INGALLS SHIPBUILDING, INC.

Employer

APPEARANCES:

Arthur J. Brewster, Esq.

For the Claimant

Paul M. Franke, Jr., Esq.

For the Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et

seq., brought by Willie McCornell (Claimant) against Ingalls Shipbuilding, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on October 16, 2000, in Metairie, Louisiana. However, prior to the scheduled hearing the parties reached agreement on all issues except the applicability of the Second Injury Fund (Section 8(f) relief) and Claimant's attorney's fees. A Joint Stipulation of Fact and Law was submitted with a Request for Entry and Order (JX-1) along with Employer's "Petition for Second Injury Fund Relief." (EX-1). This decision is based upon a full consideration of the entire record which consists of JX-1 and EX-1.¹

Briefs were received from the Claimant and the Employer. Although the Regional Solicitor was served with the Joint Stipulation and Section 8(f) Petition, no response thereto has been filed. Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

In the joint stipulation, the parties stipulated, and I find:

1. That the Claimant was subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA) while employed as a pipefitter in the construction of naval vessels at Ingalls Shipyard, which adjoins the navigable waters of the Pascagoula River and the Gulf of Mexico.

2. That Claimant's injury occurred during the course and scope of his employment with Employer on or about January 18, 1996, when he was struck in the head by a come-along lowering pipe, causing him to fall eight feet off a scaffold.

3. That Claimant suffered injuries to his head, neck, back

¹ References to the joint stipulation and exhibits are as follows: Employer Exhibits: EX-____; and Joint Exhibit: JX-____.

and other parts of his body as a result of the fall.

4. That Claimant's average weekly wage at the time of the injury was \$670.94 and the corresponding compensation rate was \$447.29.

5. That Claimant was temporarily and totally disabled as a result of the injury from January 30, 1996 through May 20, 1996; from December 12, 1996 through April 9, 1997; and from January 15, 1998 through April 27, 1999.

6. That Claimant reached maximum medical improvement on April 27, 1999.

7. That Claimant was temporarily and partially disabled from May 21, 1996 through December 11, 1996, and from April 10, 1997 through January 14, 1998.

8. That during these periods when Claimant was temporarily and partially disabled he had a wage earning capacity of \$206.00 per week.

9. That Claimant has been permanently and partially disabled from April 28, 1999 through the present and continuing, and had a post- injury wage earning capacity of \$170.00 per week.

10. That Employer timely raised the issue of Second Injury Fund relief (Section 8(f)) in this matter.

11. That no penalties or interest are due.

12. That Employer is entitled to credit for all compensation heretofore paid and for wages paid at any time during which Claimant was totally disabled.

13. That Employer will be responsible for all of Claimant's future authorized, reasonable and necessary medical treatment causally related to the injury of January 18, 1996 pursuant to § 7 of the Act.

14. That counsel for Claimant shall be entitled to a reasonable and necessary attorney fee pursuant to § 28 of the Act.

15. That Claimant's counsel shall submit his itemized fee petition setting out his claimed fee within 20 days of entry of an order in accordance with this decision, and that thereafter employer shall have 10 days to file any objections.

II. ISSUES

The sole remaining issue presented by the parties for resolution are Employer's entitlement to Second Injury Fund (Section 8(f) relief) and Counsel for Claimant's entitlement to an attorney's fee.

III. STATEMENT OF THE CASE

Medical Evidence

Dr. M.B. Moore, Jr., Marion County General Hospital

Claimant was first treated by Dr. Moore on December 12, 1987, for a dislocation of the right shoulder. (EX-B). He was prescribed physical therapy and pain medication. A closed reduction was performed on his right shoulder. Claimant was a boiler operator for Orleans Furniture Company when he fell while coming down a ladder. Claimant was paid temporary total disability benefits as a result of this fall and did not reach maximum medical improvement until March 11, 1988.

Dr. Gary H. Jackson, Southern Bone & Joint Specialists, P.A.

Claimant was first seen by Dr. Gary Jackson of Southern Bone & Joint Specialists on February 11, 1994. (EX-B). Dr. Jackson observed Claimant had been injured while working as a pipefitter with Employer. Claimant was fitting an eight inch pipe while extended on a ladder when he experienced severe pain in his lower back that caused him to drop the pipe he was holding. Claimant stepped down from the ladder and continued to work the remainder of the day.

Two days latter, on the following Monday, Claimant explained to Dr. Jackson that he was unable to get out of bed, and sought treatment with his general practitioner. The general practitioner placed Claimant on medication which he had discontinued by his appointment with Dr. Jackson.

In Dr. Jackson's evaluation, Claimant described localized pain in his lower back made worse by bending, twisting or lifting. Claimant indicated his pain was lessened when he laid down and that he also had slight pain in the medial aspects of both his legs to the knees. Claimant also described pain in the rotation of his hips.

During his physical exam, Dr. Jackson noted Claimant had, "forward flexion to 60 degrees only, extension minimal, right and left lateral bending 10 degrees with muscle spasm present." Dr. Jackson described Claimant's sensory, motor, and reflex functions of his lower extremities to be normal.

X-rays of Claimant's lumbar region showed osteoporosis and inplate impaction at the L3 and L4 levels. Dr. Jackson found marked degenerative arthritis in Claimant's hips, which was more pronounced on his left side. Dr. Jackson's diagnosis was "probable lumbar sprain."

Dr. Jackson recommended Claimant have a bone scan performed to rule out an occult compression fracture and took him off work. Claimant was prescribed a regimen of physical therapy that included walking and a flexion stretching program. Claimant was ordered Motrin, Soma and Darvocet-N 100 medications. Claimant was scheduled to return in two weeks, during which time a bone scan was to be performed.

Claimant saw Dr. Jackson again on March 2, 1994, at which time he continued to complain of back pain. Dr. Jackson assessed Claimant's bone scan as showing no signs of fracture and recommended the discontinuation of formal therapy. Claimant was to continue walking and stretching in conjunction with the aforementioned medicines.

Claimant saw Dr. Jackson a third time on March 9, 1994, during which he complained of "on and off back pain" as well as right thigh and leg pain. Dr. Jackson evaluated Claimant as now walking without a limp and with "a much straighter spine." Claimant's prescription was changed from Motrin to Lodine, and the Soma and pain medication was discontinued. Claimant was instructed to have an MRI performed and to continue his walking exercises.

Claimant was seen again March 21, 1994, and reported no further complaints. Dr. Jackson opined that Claimant's MRI showed, "a slight, lateral recess bulging/herniation of L4, 5 to

the left." Dr. Jackson could not correlate the MRI results of the left lateral recess with Claimant's previous complaints of right leg pain.

When Claimant saw Dr. Jackson on April 18, 1994, he was returned to regular work duty with the restriction of no lifting of 40 pounds for two weeks. Subsequently, Claimant saw Dr. Jackson for the last time on May 2, 1994, at which time he was returned to regular work duty without restrictions.

Forest General Hospital

Claimant was treated in the Forest General Hospital Emergency Room on August 7, 1995, for left shoulder pain due to arthritis. (EX-B). The treating physician, Dr. Charmaine McCleave, found Claimant had a full range of motion in the shoulder and diagnosed him as having degenerative joint disease. Claimant was prescribed Toradol, Lorcet 5, Orudis and Loratab Plus.

X-rays revealed findings of osteoarthritis with cartilage destruction and periarticular bony sclerosis and some hypertrophic changes of the glenohumeral joint. (EX-B).

Dr. Marc D'Angelo

Claimant was first treated by Dr. D'Angelo on January 30, 1996, as the result of a head injury he received while working for Employer. (EX-A). Claimant described the injury as occurring when a piece of pipe he was working on came loose falling two feet and hitting his head. This resulted in Claimant falling to his knees and being knocked unconscious for "less than five minutes." After regaining his composure, Claimant walked to Employer's infirmary where he was evaluated clinically and with x-rays for complaints of pain in his head, neck, low back and left hip. Claimant reported that his hands were numb. Subsequently, Claimant was taken off work and given a neck brace and medication.

Claimant conveyed to Dr. D'Angelo that he was in a great deal of discomfort that night after his initial treatment and his family transported him to the Methodist Hospital Emergency Room where a CAT scan was performed.

Claimant complained to Dr. D'Angelo that he experienced headaches of increasing intensity, associated with nausea and blurred vision. Claimant described a "chalky numbness in both hands which begins in the mid forearm." Claimant attested to continued neck and low back pain, as well as pain in his left hip, although this had receded such that he could walk without interference.

Dr. D'Angelo noted that during the night Claimant experienced "nocturia and frequent urination" in addition to which he had trouble sleeping for more than three hours at a time.

Dr. D'Angelo noted two previous injuries in Claimant's past medical history: a low back injury suffered two years prior while lifting a pipe for Employer which caused him to miss two months of work, and a motor vehicle accident when Claimant was 20 years of age where he fractured his left hip.

Dr. D'Angelo's impression was that Claimant had suffered a "closed head injury with post concussion syndrome including headaches, sleep disturbance, and mild positional dizziness." In addition, Dr. D'Angelo found an axial compression neck injury with subsequent neck pain, slight left-sided reflex preponderance and a left hip injury that he opined was an exacerbation of an old left hip injury.

Dr. D'Angelo prescribed medications for Claimant and ordered a battery of physical therapy three times a week for four weeks to address Claimant's neck and lower back pain. Claimant was further ordered to remain off work.

Claimant saw Dr. D'Angelo again on February 28, 1996, at which time Claimant continued to experience "right-sided neck, arm, and back pain." Claimant described sharp pains in both hands and legs that were intermittent and "shock-like." Claimant indicated in the interim he had sought treatment from his family physician, Dr. Goel, for his high blood pressure.

Dr. D'Angelo opined Claimant's neck and back pain were the result of his closed head injury of January 18, 1996. Dr. D'Angelo ordered Claimant to continue to stay off work, take his medication and extended his course of physical therapy by three sessions.

Claimant saw Dr. D'Angelo a third time on March 18, 1996.

Dr. D'Angelo's assessment of Claimant continued to be the same (neck and back pain as the result of his closed head injury January 18, 1996). At this session, Dr. D'Angelo changed Claimants medications. Claimant was ordered to seek further treatment for his hypertension, perform two more weeks of physical therapy, and begin walking. Dr. D'Angelo also opined Claimant could return to work in two to three months.

Claimant next saw Dr. D'Angelo on April 15, 1996, at which time he continued to have the same back and neck pain as in his prior office visits. Dr. D'Angelo noted at this appointment that in addition to Claimant's disturbed sleep and pain, "other factors" may have been contributing to Claimant's failure to respond to treatment. Claimant's dosage of Nortriptyline was increase again and he was "strongly urged to quit smoking and to abstain completely from alcoholic beverages."

At Claimant's next appointment on May 15, 1996, Dr. D'Angelo noted Claimant had alcohol on his breath, which he correlated with a previous report of alcohol smell by the physical therapist. Dr. D'Angelo opined Claimant had degenerative joint disease in both hips, low back pain (probably secondary to the pain radiated from his hips or caused by an abnormal angle of his lower spine as Claimant avoids putting weight on either hip), neck pain and headaches, both of which may have resulted from tension.

Dr. D'Angelo ordered three more sessions of physical therapy, an MRI of Claimant's lumbosacral spine and a drug screen. The MRI was performed on May 28, 1996, at Forest General Hospital and showed "slight bulging disc material at L4-L5 and hypertrophic changes in the posterior elements causing mild spinal stenosis." Claimant's drug screen was positive for ethanol.

Claimant's met again with Dr. D'Angelo was June 3, 1996, at which time his treatment was discontinued. Dr. D'Angelo stated that Claimant's failure to be forthright in his answers regarding his use of alcohol and his subsequent use in direct non-compliance with instructions was an impediment to any final recovery. Dr. D'Angelo stated he could no longer prescribe medications for Claimant because of their harmful interactions with alcohol. Claimant was urged to stop drinking and recommended to return to work by June 10, 1996, without any work restrictions.

Claimant subsequently sought treatment with Dr. Christopher Fox and did not see Dr. D'Angelo again until March 10, 1997. At this examination, Claimant continued to have the same problems as when he had previously been examined. He was subsequently referred to Dr. Seymour, an Orthopedic Surgeon.

Dr. Guy L. Rutledge

On July 25, 1996, Claimant was examined by Dr. Rutledge at the request of Employer. Dr. Rutledge reviewed progress notes of Dr. D'Angelo and diagnostic testing to include a lumbar MRI, X-rays of the cervical spine, hand and wrist and a CT scan of the cranium. Claimant complained of pain at the base of his skull and low back to his knees.

Dr. Rutledge performed a physical examination which revealed no finding suggestive of significant injury. He conducted x-rays of Claimant's shoulder which were considered normal. He opined that Claimant had no evidence of a physical injury that would prevent him from working and he should return to light duty work for a while to increase his physical capability to perform his usual occupation. (EX-A).

Dr. Christopher Fox, Shoreline Orthopaedics APMC

Claimant was first seen by Dr. Christopher Fox on July 2, 1996, complaining of injuries to his back, neck and right shoulder. At this appointment, Claimant attested to drinking approximately a 12 pack of beer each week in addition to smoking ½ pack of cigarettes a day.

Claimant's physical examination showed a negative straight leg raise and positive impingement test of his shoulder. X-rays of his cervical spine indicated some degenerative joint disease and x-rays of his lumbar spine showed some degenerative joint disease at L5-S1. X-rays of Claimant's shoulder showed acromioclavicular degenerative joint disease. Dr. Fox opined Claimant had probable cervical radiculopathy without any evidence of severe cord compression, bulging to protruding discs with degenerative changes at L4-L5 and L5-S1, degenerative joint disease of the lumbar spine and probable impingement syndrome of the shoulder.

Dr. Fox recommended an MRI be performed on Claimant's right shoulder, a myelogram of the cervical and lumbar spine, and a CT

scan. Claimant was prescribed a Medrol Dose Pak and Flexeril to sleep. Claimant began seeing Dr. Fox each month, but did not have the aforementioned MRI until December 29-30, 1996. MRIs were performed on Claimant's cervical spine and right shoulder respectively, showing what Dr. Fox described as "fairly severe pressure" at the C4-C5 area with a herniated disc and spondylitic changes at C6-C7 and lesser changes at C5-C6. Dr. Fox opined Claimant would be treated well with fusion at the C4-C5, C6-C7, and possibly at the C5-C6 level. Dr. Fox also opined that based on the right shoulder MRI, Claimant had tendinitis consistent with impingement syndrome, which could be treated with arthroscopy surgery and subacromionial decompression.

Claimant continued to see Dr. Fox in March, April, July and August 1997. During his July 22, 1997, examination Dr. Fox noted alcohol on Claimant's breath. Claimant had a lumbar myelogram performed and was seen for follow-up September 9, 1997, showing a bulge at L4-L5. Claimant continued to be treated by Dr. Fox, and on January 15, 1998, had a three level anterior cervical decompression and fusion performed.

On April 19, 1999, Claimant underwent a functional capacity evaluation at the Rehabilitation Center. It was determined that Claimant did not meet the physical demands required of his former pipefitter job which was considered at the heavy exertional level. Claimant was assessed at a physical capacity level of light-medium. Claimant had problems walking for long periods, working and lifting overhead, bending, squatting, kneeling, climbing, lifting and carrying. A conditioning program to increase Claimant's physical capacity was recommended.

Claimant continued to see Dr. Fox post-operatively until April 27, 1999, when he reached maximum medical improvement. After reviewing Claimant's medical records, he concluded Claimant had sustained a low back injury in 1994 as well as shoulder injuries in 1987 and 1995. Dr. Fox opined the following, "based on a reasonable medical probability . . . his pre-existing back and shoulder problems . . . would combine and contribute with the effects of his injury on January 18, 1996, to make him substantially more disabled than he would have been as a result solely of the injury of January 18, 1996, alone." (EX-C).

IV. DISCUSSION

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 835 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Risch v. General Dynamics Corp., 22 BRBS 251 (1989). In permanent partial disability cases, such as here, an additional requirement must be shown, i.e., that Claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. § 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

Existing permanent partial disability under Section 8(f) "can be economic disability . . . or one of the scheduled losses . . . but is not limited to those cases alone . . . wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." C & P Telephone Co., 564 F.2d at 513.

I find that Claimant injured his back, neck and shoulder in the course and scope of his employment on January 18, 1996. On January 15, 1998, Claimant underwent an anterior cervical discectomy at the C4, 5, 6 and 7 levels. He had a pre-existing condition as the result of a right shoulder dislocation that occurred while employed at Orleans Furniture, Inc. on December 12, 1987, and a pre-existing low back injury that occurred while working for Employer on January 28, 1994. As the result of this low back injury, Claimant was diagnosed with osteoporosis with questionable inplate impaction at L3-L4 with marked degenerative arthritis. Claimant was further diagnosed with a lateral

recess/bulging herniation at L4-5 as a result of this injury. Claimant was released to return to work with restrictions against heavy lifting and cautions of possible flare ups. Claimant was treated for a subsequent left shoulder injury on August 7, 1995, and diagnosed with osteoarthritis.

I further find and conclude that the foregoing injuries constitute pre-existing conditions which were clearly manifest to the Employer since at least one of the injuries (the January 28, 1994 low back injury) occurred in the course and scope of Claimant's employment with Ingalls. Claimant's other pre-existing disabilities were either actually manifest to Employer or were objectionably determinable by the presence of pre-existing medical records or other documents had Employer chosen to examine them. Director, OWCP v. Brandt Airflex Corp., 645 F.2d 1053 (D.C. Cir. 1981).

The weight of the uncontradicted medical evidence submitted, specifically that of Dr. Fox, shows that Claimant's pre-existing injuries combined and contributed to the last work injury to make his most recent injuries materially and substantially worse and more disabling than it would be alone. Dr. Fox's opinion was uncontroverted by the Regional Solicitor who failed to file a brief.

Based on the foregoing, I find and conclude that Employer has established entitlement to Special Fund Relief pursuant to Section 8(f) of the Act which is hereby **GRANTED**.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the

United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer's request for Section 8(f) relief is hereby **GRANTED**.

2. Employer shall pay Claimant compensation for temporary total disability from January 30, 1996 to May 20, 1996; from December 12, 1996 to April 9, 1997; and from January 15, 1998 to April 27, 1999, based on Claimant's average weekly wage of \$670.94 and corresponding compensation rate of \$447.29, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer shall pay Claimant compensation for temporary partial disability from May 21, 1996 to December 11, 1996, and from April 10, 1997 to January 14, 1998, at the rate of \$309.95 per week based upon two-thirds of the difference between Claimant's average weekly wage of \$670.94 and his reduced weekly earning capacity of \$206.00 in accordance with the provisions of

Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer shall pay Claimant compensation for permanent partial disability commencing from April 28, 1999, and continuing thereafter for 104 weeks at the rate of \$333.63 per week based upon two-thirds of the difference between his average weekly wage of \$670.94 and his reduced weekly earning capacity of \$170.00 per week in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

5. After the cessation of payments by Employer, continuing benefits shall be paid pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further notice.

6. Employer shall remain responsible for all reasonable, appropriate and necessary medical expenses arising from Claimant's January 18, 1996 work injury, pursuant to the provisions of Section 7 of the Act.

7. Employer shall receive credit for all compensation and interest heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 20th day of October, 2000, at Metairie, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge